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United States Environmental Protection Agency
Enforcement and Compliance Docket and Information Center
Attn: Docket Number EC-2000-007
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Re: Docket Number EC-2000-007 "*Establishment of Electronic Reporting: Electronic Records; Proposed Rule*" (66 Fed. Reg. 46,162 (August 31, 2001))

***VIA*: Messenger**

To Whom It May Concern:

On behalf of the Council of Industrial Boiler Owners ("CIBO"), I am pleased to submit the following comments on the Environmental Protection Agency's ("EPA") proposed rule on the establishment of electronic records and reporting. EPA published this rule, commonly known as the Cross-Media Electronic Reporting and Recordkeeing Rule ("CROMERRR"), on August 31, 2001 (66 Fed. Reg. 46,162). We respond in a timely fashion, pursuant to EPA's action, *Extension of Comment Period for and Public Meetings on the Proposed Establishment of Electronic Reporting* (67 Fed. Reg. 278 (January 3, 2002)).

CIBO is a national trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and universities representing 20 major industrial sectors. CIBO was formed in 1978 to promote the exchange of information between industry and government relating to energy and environmental policies, laws, and regulations affecting industrial boilers. CIBO membership represents industries as diverse as chemical, paper, cogeneration, steel, automotive, refining, brewing, combustion engineering, and food products. CIBO members also include operators of boiler facilities at major universities.

On environmental issues, CIBO works closely with EPA, the United States Department of Energy, state regulatory authorities, and other governmental bodies to effectuate common-sense environmental regulation. We maintain that environmental regulatory schemes should provide industry with enough flexibility to effectively—and without penalty—modernize our aging energy infrastructure, since modernization holds the key to cost-

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effective environmental protection. Pursuant to EPA's request, our comments below address the recordkeeping provisions of the proposed rule.

Executive Summary

- Contrary to the language of the proposed rule, the recordkeeping provision of CROMERRR is not voluntary.
- CROMERRR's recordkeeping provision is prohibitive in cost and technically infeasible, causing a disincentive, rather than the stated incentive, to maintain records electronically.
- CROMERRR's recordkeeping provision yields little benefit and fails to prove the existing electronic systems create unreasonable risk, as required by the Government Paper Elimination Act.
- For these reasons, if not withdrawn, CROMERRR would likely fail judicial review, under the Administrative Procedure Act.

Contrary to the Language of the Proposed Rule, CROMERRR's Recordkeeping Provision is not Voluntary.

In its proposed rule, EPA states that "...under today's proposal, the choice of using electronic rather than paper for future reports and records will remain purely voluntary." The choice is only voluntary, however, if a regulated entity is currently keeping all of its records on paper. If an entity keeps any records electronically, then those records are subject to the complex requirements of CROMERRR. Compounding this problem is the expansive definition of "electronic record" as supplied by EPA:

> Electronic record means any combination of text, graphics, data, audio, pictorial, or other information represented in digital form that is created, modified, maintained, archived, retrieved or distributed by a computer system.[1]

Since virtually all EPA-regulated facilities use "electronic records" to meet a multitude of EPA recordkeeping requirements, virtually all EPA-regulated entities will be subject to the complex and costly CROMERRR retrofit requirements.

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[1] Establishment of Electronic Reporting: Electronic Records; Proposed Rule, 66 Fed. Reg. 46161, 46189 (August 31, 2001) (to be codified at 40 C.F.R. Parts 3, 51, *et al*)

The extent to which industry relies on what CROMERRR defines as "electronic records" for meeting their environmental compliance obligations has been neglected in EPA's analysis of the impact of the proposed cost of this rule. Promulgation of CROMERRR's recordkeeping provisions would require industry to retrofit most of their existing computer-based infrastructures. EPA has not considered these massive costs. Indeed, because of the extent to which computers are currently used for all aspects of business, including records required for environmental compliance, the CROMERRR recordkeeping provisions are NOT voluntary and would place an unreasonable burden on industry with no clear benefit.

Increasingly, policymakers are calling for more comprehensive information about environmental quality and the performance of individual facilities. Currently, about 1.2 million entities file reports under EPA regulations, either directly or through delegated state programs. Our industry creates and maintains thousands of electronic records, pursuant to, *inter alia*, the Clean Air Act ("CAA"), the Clean Water Act ("CWA"), the Toxic Substances Control Act ("TSCA"), and the Resource Conservation Recovery Act ("RCRA").

Some records we generate (*i.e.*, continuous emissions monitors or temperature and flow meters) exclusively by use of computer. For instance, industrial boiler owners are required by EPA to monitor emissions from their facilities. To comply with these requirements, we collect, compute, and store data electronically. Not only do we collect the raw data for these reports electronically, but also we use the computer-generated data to calculate and document emissions data. Monthly data is often a summation of more frequent data collection, and annual data the summation of monthly data. Under CROMERRR, these records would be "electronic records" and subject to the complex CROMERRR criteria. If a particular record does not meet CROMERRR criteria, then the facility is in violation of the underlying recordkeeping requirement. Since none of our computer systems were designed to meet CROMERRR criteria, most, if not all, of our records would be invalid, if CROMERRR provisions are promulgated.

Further, each facility typically has multiple electronic recordkeeping systems on site, each of which would require upgrading. The multiplicity of systems coupled with the expansive definition of "electronic records" yields a mandate from EPA to regulated entities to expend enormous time, energy, and money on this "voluntary" program. Truly, facility owners are left with a Hobson's choice: either overhaul your electronic recordkeeping systems to comport with the complex and costly requirements of CROMERRR or manually document everything on paper, an impossible "option" under the constraints of other regulatory requirements.

Given the impact this mandate would have on industry's ability to comply with other regulatory requirements, we respectfully request that the recordkeeping provision of

CROMERRR be removed from EPA's proposed rule. Although we strongly support decoupling the recordkeeping provision, if the provision comes before us again in another proposed rule, then we recommend narrowing the definition of "electronic record" to encompass only the final product industry delivers to EPA and expressly excluding "electronic data" from that definition.

CROMERRR's Recordkeeping Provision is Cost Prohibitive and Technically Infeasible, Causing a Disincentive to Maintain Records Electronically.

Due to its widespread use and cost-effectiveness, electronic recordkeeping has become an ubiquitous part of our industrial and commercial world. However, the introduction of the nine criteria of CROMERRR will lessen the cost-effectiveness of the practice, thereby lessening its use. In light of EPA's goal to increase electronic reporting and its stated intent of "streamlining and expediting the process for reporting,"[2] this result is ironic at best and an enormous step backward for industry at worst.

The nine criteria of CROMERRR are technologically infeasible, including the archiving, audit trails, migration, and onsite availability requirements. To date, no commercially available, off-the-shelf software meets the requirements of CROMERRR's recordkeeping provision. In the absence of vendor technology, the companies must create software, incurring programming, specifications, coding, and validation activities at significant effort and expense.

EPA estimates that a recordkeeping system would cost $40,000 initially and that the cost of maintaining that system would be $17,000 annually.[3] If the estimated 1.2 million facilities incurred these costs, the initial costs of complying with CROMERRR recordkeeping provisions would be $48 billion, and the annual maintenance cost would be $20 billion. Although these estimated costs are expensive, industry believes even this costly estimate is unrealistically low. In fact, during a recent public meeting on CROMERRR, Dow introduced an estimate that the actual cost of complying with CROMERRR recordkeeping provisions would exceed $1,000,000 per facility.

Likely this more realistic cost submitted by Dow takes into account the multiplicity of electronic recordkeeing systems per facility. Each system in the facility could cost the initial $40,000 and subsequent $17,000 per year. For a large facility, with 20 systems, this could mean $800,000. Critically, for a small facility with three systems, this could mean an exorbitant $120,000. As you know, industrial boiler owners do not enjoy the economies of scale of the larger utility boilers. Many operate as small businesses. Requiring these small

[2] 66 Fed. Reg. 46161, 46185 (2001).
[3] 66 Fed. Reg. 46161, 46178 (2001).

businesses to comply with such an expensive and complex investment would hamstring our operations, forcing us to expend our limited resources on paperwork rather than produce energy. Our fear is that this expense is too much for our industry to bear alone, translating into a cost that consumers will ultimately absorb.

Due to the unintended effect of creating a disincentive to keep electronic records, as evidenced by the prohibitive cost, we respectfully request that EPA remove the CROMERRR recordkeeping provision from the proposed rule.

CROMERRR's Recordkeeping Provision Yields No New Information and Fails to Prove the Existing Electronic Systems Create Unreasonable Risk, as Required by the Government Paperwork Elimination Act.

The CROMERRR recordkeeping provision does not change the industries' substantive environmental reporting requirements. Through this provision, EPA is not requesting more, additional, or different information from industry that will help promote the environmental goals of the agency. Rather, EPA expresses concern that companies have or might submit fraudulent records to the agency. Apparently proceeding in the absence of evidence of such fraud, the agency created the complex and multiple CROMERRR recordkeeping criteria. Thus, the proposed recordkeeping provision of CROMERRR forces regulated entities to spend their limited resources on procedures that generate no new information and guards against risks that have not been adequately articulated by EPA.

This complex set of criteria diametrically opposes the mandates of the Government Paperwork Elimination Act ("GPEA"), which cautions:

> Setting up a very secure, but expensive, automated system may in fact buy only a marginal benefit of deterrence or risk reduction over other alternatives and may not be worth the extra cost. For example, past experience with fraud risks, and a careful analysis of those risks, shows that exposure is often low. If this is the case, a less expensive system that substantially deters fraud is warranted, and not an absolutely secure system.[4]

OMB's guidance instructs agencies to adopt the appropriate level of protection, based on risk and cost-benefit analyses. EPA did not conduct a risk analysis. EPA did not determine "the likelihood the damaging event will occur...the cost of potential losses...and the costs of mitigating actions that could be taken."[5] Rather, EPA, borrowing from the Food and

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[4] Office of Management and Budget, *Implementation of the Government Paperwork Elimination Act*, Part II, § 3(a).

[5] *Id.* at Part II, § 3.

Drug Administration, developed CROMERRR, which calls for an absolutely secure electronic system, notwithstanding the lack of evidence of risk. This blanket approach is not only contrary to the provisions of GPEA, but also it is superfluous: most of the environmental laws by which industry abides provide for the punishment, civilly and/or criminally, of those defrauding the government.

Since EPA failed to conduct the risk analysis provided for in OMB's guidance on GPEA, and EPA's motivation to create the recordkeeping provision of CROMERRR is underpinned by an attempt to thwart an unproven risk, this portion of CROMERRR must be withdrawn from the proposed rule.

For the Foregoing Reasons, If Not Withdrawn, CROMERRR Would Likely Fail Judicial Review, Under the Administrative Procedure Act.

In the absence of an identifiable risk and in light of the prohibitive costs, technological infeasibility, and unnecessarily rigorous criteria, it is likely that CROMERRR would fail judicial review.

It has long been held that EPA "must consider all of the relevant factors and demonstrate a reasonable connection between the facts on the record and the resulting policy choice." *Sierra Club v. Costle*, 657 F.2d 298, 323 (D.C. Cir. 1981); Small Refiner Lead Phase-Down Task Force at 520. Courts reviewing CROMERRR will engage in a "searching and careful" review of the administrative record. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Further, EPA may not hide behind its administrative discretion as an excuse for "offer[ing] an explanation for its decision that runs counter to the evidence before the agency." *Monsanto Co. v. EPA*, 19 F.3d 1201, 1207 (7th Cir. 1994). Given the problems identified in our comments, CIBO submits that CROMERRR cannot and will not survive a minimally sufficient legal review.

Very truly yours,

Robert Bessette

Robert D. Bessette

Enclosures: 3 copies